SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 733

JOSEPH FRIEDMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION.

Opinion.

The Per Curiam opinion of the Circuit Court of Appeals for the Third Circuit was filed October 6, 1941, and appears at page 629 of the Record.

Jurisdiction.

The statement of the grounds on which the jurisdiction of this court is invoked is contained in the Petition for Writ of Certiorari, *supra,* (page 2).

Statement of the Case.

The statement of the case is contained in the Petition for Writ of Certiorari, *supra,* (page 2).

Specification of Errors.

The defendant urges the following assigned errors:

41. The trial court erred in admitting in evidence, over objection of the defendant, the partnership return of Daniels, Williams and Friedman for the year 1937, being exhibit G-4. (R. 613.)

42. The trial court erred in refusing to charge the jury as requested by the appellant as follows:

> First: The offenses charged in the indictment are wholly statutory in origin, and before you can find the defendant guilty of any such offense, you must be satisfied beyond a reasonable doubt that the Government has proved against the defendant each and every element of such offense as defined and described in the statute creating it. (R. 613.)

57. The trial court erred in charging the jury as follows:

> A reasonable doubt is not every doubt that may flit through your minds in considering the case. To justify acquittal it must be substantial in view of all the evidence and not a mere possibility of innocence. (R. 618.)

ARGUMENT.

Question 1.

A) Is a Partnership Income Return (G-4, R. 587-591), supposedly prepared, made, signed and filed by one co-partner admissible against a defendant,

B) Is it evidence of Willful evasion of the defendant's individual income tax,

C) Can the trial court say to the jury that "the partnership return was filed by the defendant and his partners"

When:

a) The partnership was engaged in a single illegal enterprise prohibited by a State statute, namely, gaming;

b) The defendant is charged with willful evasion of only his individual income tax;

c) There is no proof of guilty knowledge by the defendant of the preparation, making, signing or filing of the partnership return by his copartner;

d) There is no evidence that the defendant was an accessory before or after the fact to the preparation, making, signing or filing of the partnership return by his copartner?

The defendant was indicted for willfully evading his individual income tax for the years 1935 (count 1), 1936 (count 2), and 1937 (count 3).

When the first witness was called, the original Partnership Income Return (G-4) of "Daniels, Williams & Friedman" was offered in evidence and conceded. As an official document of the government, produced by an officer of the government, it was admissible, subject only to being connected with the defendant and the crimes charged. The only attempt to show such connection appears at pages 407 to 410 of the Record.

Consequently, the Record is utterly barren of any evidence showing that the defendant Friedman possessed any guilty knowledge of the fact that his copartner, Williams, either prepared, made, signed or filed such return. There is no evidence that the defendant was accessory before or after the fact to the preparing, making, signing or filing of the partnership return.

At the conclusion of all of the evidence, counsel for the defendant asked the court to exclude the partnership return, G-4, but it was admitted over defendant's objection and exception (R. 545-6).

In *Sleight* v. *U. S.* 87 F. 2d 459, 461, 65 App. D. C. 203, the court, in reversing a conviction of a partner for larceny, said:

> It is also urged by counsel for the government that Sleight and Hunter were copartners, and that Sleight is responsible for the acts of Hunter in taking the automobile from the government parking space to the Gist garage; and that any criminal delinquincy that Hunter may have been guilty of in connection with this transaction is chargeable to the defendant. *This is not the law.* A partner is not liable for the criminal acts of his copartner unless he possesses guilty knowledge of the criminal act of his copartner or is an accessory either before or after the fact. The liability of copartners in civil cases, for the acts of each other, respecting partnership affairs, does not attach to criminal transactions. (Italics supplied.)

In *Singer* v. *U. S.* (C. C. A. 3) 58 F. 2d 74, 76, (an income tax evasion case), the court held that the records of a corporation were inadmissible against the individual defendant where they were not properly identified. The court said:

> * * * Government Exhibit 94 likewise was inadmissible because it was not shown that the entries were made in the regular course of business, nor who the entrant was, nor whether or not he was available for testimony.

Still another grave error occurred in the charge to the jury respecting G-4, the partnership return. The Court said:

> For the year 1937, the defendant filed an income tax return on time, and it is for you to determine whether that return was correct or fraudulent. For that year a partnership return *was filed by the defendant and his partners,* Daniels and Leroy Williams. This return reported approximately $148,000 gross business. There

> has been testimony that the gross business for 1937 was between $255,000 and $312,000. If you believe from the evidence that the gross business of the partnership was substantially in excess of that reported on this partnership return, and that as a result the net income reported on the return was less than the true net income, you may find that the income reported by the defendant on his individual return was incorrect. *If you find* from all of the circumstances *that the defendant knew that a false partnership return was filed*, you may consider that as some evidence that he endeavored to evade his own income tax for the year 1937.

The words of that charge which are in italics show that the court first charged that the defendant actually filed the partnership return, and immediately thereafter left the same question to the jury to determine. The court invaded the province of the jury by stating the ultimate fact which the jury was later told to determine.

In the above charge the court made a document, which was improperly admitted in evidence, the basis upon which the jury could say whether the defendant's individual income tax was willfully evaded. If the partnership income return was inadmissible, there was no basis for the above instruction, it was clearly error.

QUESTION 2.

It is reversible error for the court to instruct the jury: "To justify an acquittal it (reasonable doubt) must be substantial in view of all the evidence and not a mere possibility of innocence"?

In *Boatright* v. *U. S.* (C. C. A. 8) 105 F. 2d 737, 740, (a mail fraud case), the court said:

> On the question of reasonable doubt, the court, among other things, said: "If, after all is said and done, there should arise in this case a reasonable doubt as to the guilt of the defendants, or either of them, it would be

> your duty to give them, or him, the benefit of such a doubt, and acquit him or them *as the doubt might justify or warrant you in doing.*"
>
> Just what is meant by the limitation "as the doubt might justify or warrant you in doing", is not clear, and we think that the defendants were entitled to an instruction without such limitation.

In *Paddock* v. *U. S.* (C. C. A. 9), 79 F. 2d 872, 876, (an income tax prosecution) the court held the following charge to be error:

> * * * Have you a conscientious belief that the defendant is not guilty? * * * Now if you are convinced that a certain thing is true, then you are not at liberty to conjure up and to question yourself, in fact. "Do I have a reasonable doubt about this?" That is not it at all. * * * You know whether you believe a thing or not. * * * Do you believe this? Each one asks himself, "Do you believe that?" * * * If you can say that you believe one way or the other on that. * * * If you believe those things, don't hesitate to say so.

Of that charge, the court said:

> The rule is stated in 16 C. J. 2405, P. 995: * * * "It has been held that defining belief beyond a reasonable doubt as consisting in a conscientious belief that accused is guilty is error."

It will be noted that after giving the charge we are here criticising, the court properly charged on reasonable doubt, and this in the very next sentence. However, which charge the jury followed cannot be determined.

In *Mills* v. *U. S.*, 164 U. S. 644, 649, 17 S. Ct. 210, 41 L. Ed. 484, the trial court gave conflicting instructions. In holding that to be error, this Court said:

> * * * Although it may be claimed that other portions of the charge of the learned court stated correctly the law with reference to this particular case, yet we

> cannot escape the fear that the error above pointed out may have found lodgment in the minds of the jury. Which of the two statements was received and acted upon by the jury it is wholly impossible for this court to determine, and as one of them was erroneous in not more fully and definitely stating what was the character of the non-consent which rendered the mere amount of force incident to the performance of the act itself sufficient to constitute the crime, the judgment of death must be reversed, and the defendant subjected to another trial where the rules of law applicable to the case shall be correctly and fully stated to the jury.

In *Nicola* v. *U. S.* (C. C. A. 3), 72 F. (2d) 780, 787, the court said:

> * * * Where two instructions are given to a jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn. *State* v. *Tapack*, 78 N. J. L. 208, 210, 211, 72 A. 962; *Rice* v. *Olin*, 79 Pa. 311; *Commonwealth* v. *Molten*, 230 Pa. 399, 407, 79 A. 638; *Drossos* v. *U. S.* 164 U. S. 644, 649, 17 S. Ct. 210, 41 L. Ed. 584.

To same effect: *Dr. J. H. McLean Medicine Co.* v. *U. S.* (C. C. A. 8), 253 Fed. 694, 165 C. C. A. 288.

QUESTION 3.

Where the defendant in a criminal trial requests the court to charge the jury that the burden of proving every material element of the crime charged, beyond a reasonable doubt, is upon the prosecution,—is it then sufficient for the court to state to the jury that which the court considers to be the material elements of the crime, yet (a) fail and refuse to tell the jury that all of those material elements must be proved beyond a reasonable doubt, and (b) state all of the material

elements of the crime in such a manner as to confound and confuse the jury?

The court was requested to charge (R. 565):

> First: The offenses charged in the indictment are wholly statutory in origin, and before you can find the defendant guilty of any such offense, you must be satisfied beyond a reasonable doubt that the Government has proved against the defendant each and every element of such offense as defined and described in the statute creating it.

That request was denied "as it was covered in the main charge" (R. 558). Exception was noted thereto (R. 561).

The court did charge that there were two elements in the crime charged, "two principal elements at least" one, that the defendant owed a tax and two, that he willfully attempted to evade it.

The court never did tell the jury that all of the material elements of the crime had to be proved beyond a reasonable doubt. That is what the defendant requested when he asked that the court charge "on each and every element" of the offense "as defined and described in the statute creating it." Nothing could have been more clearly brought to the attention of the court.

In *McAfee* v. *U. S.*, 105 F. (2d) 21, 31, 70 App. D. C. 142 (a homicide case), the court reversed for failure to charge as we here requested, saying:

> * * * The purpose of such an instruction is to impress upon the minds of the triers of fact the proposition that guilt depends upon demonstration beyond a reasonable doubt of the existence of each of the several elements which, as a matter of law, constitute the crime charged, rather than upon some vague general notion that the defendant did some sort of wrongful act. Such a construction is to be contrasted with those which tell a jury that they may not

convict if they have a reasonable doubt "upon the whole evidence" or that they may convict if "upon the whole evidence" they are convinced beyond a reasonable doubt of guilt. The instant case belongs to the latter type of instructions. The charge actually given to the jury in the instant case belongs to the latter type of instructions.

See also:

Spear v. *U. S.* (C. C. A. 8) 228 Fed. 485, 488;
Heard v. *U. S.* (C. C. A. 8) 228 Fed. 503, 504.

Immediately after the court instructed on reasonable doubt, the court told the jury that "willful" as used in the statute was used in "its ordinary and common meaning" (R. 554). Yet later the court charged that "willful" was not to be taken in its ordinary and common meaning, but that it meant "actual knowledge" and was "of the very essence of the statutory crime charged" (R. 559). Once again the jury was given contradictory charges. Undoubtedly, the latter charge is correct. *Hargrove* v. *U. S.* (C. C. A. 5) 67 F. (2d) 820, 823, a prosecution similar to the one at bar.

Consequently, we again invoke the rule of law, quoted *supra*: "where two instructions are given to a jury, one erroneous and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error." *Nicola* v. *U. S.*, *supra*.

Conclusion.

Wherefore, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals, for the Third Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all of the pro-

ceedings in the case numbered 7744 and entitled on its docket United States of America *v.* Joseph Friedman, and that the said judgment of the Circuit Court of Appeals, for the Third Circuit, may be reversed, and for such other and further relief as to the Court may seem meet and proper.

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(7258)

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 733

JOSEPH FRIEDMAN, ALIAS "ZENDEL" FRIEDMAN,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In the Government's brief in opposition heretofore filed in this case it was contended that the information return filed for the year 1937 by the partnership of which the petitioner was a member was admissible in evidence and might properly be considered by the jury in accordance with the instructions of the trial court.[1] In support of this

[1] This return was originally admitted in evidence without objection (R. 93). Subsequently it was apparently objected to either on the ground of surprise or on the ground that it

contention three circumstances were briefly referred to, the relationship between the partnership return and the petitioner's individual return (R. 579), the false statements contained in the former as to the partnership income and the partners' distributive shares (R. 422–423), and the petitioner's knowledge of the incorrectness of the partnership return contemplated to be filed (R. 408–409). This supplemental memorandum is submitted for the purpose of setting forth in more detail the facts surrounding the 1937 partnership return, the petitioner's knowledge thereof, and the nature of the incorrectness of which he had knowledge.

The petitioner had a one-half share in the partnership, composed of himself, Daniels and Williams, which operated a numbers game at night during the first half of 1935 (R. 391). In June of that year this partnership combined with seven other numbers "banks," which operated in the daytime, to form an organization (R. 477) to control and operate the numbers game in Atlantic City (R. 392–398, 450). The purpose of this organization was "to inaugurate a new plan where everybody would put their business in to one and [sic] they knew that everybody would not go around and steal each other's business and pay extra odds to

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had not been referred to in the indictment or in the opening or in the bill of particulars (R. 398–407). At the conclusion of all the evidence the petitioner objected to its admissibility and noted an exception (R. 546), but there was no motion to strike or to exclude the return from evidence.

the pick-up men * * *" (R. 393). The odds to be paid and the compensation of the "writers" and "pick-up" men were established (R. 393), an operating "bank roll" contributed to by each bank was set up (R. 394, 451), and generally the member banks "worked together" (R. 394).

The business of this organization was done in one office and was primarily handled by four men, although each member was "allowed one man to come in and work * * *" (R. 393). The daily receipts of all the banks were handled in the central office (R. 395, 450). The amounts taken in and paid out by each bank were recorded daily and totalled at the end of each week, when the profits were distributed (R. 452–453). The total profits of the organization were pooled and each member bank, including the bank in which petitioner was a partner, was entitled to receive one-eighth of the net profits without regard to the amount of business done by each bank (R. 394).

The partnership continued to be a member of this organization through 1936 and 1937 (R. 395). In 1937 the partnership received from the organization as its share of the net profits approximately $28,000, of which the petitioner received approximately $14,000 (R. 422).

The partnership return for 1937 (R. 587) did not reflect these facts. It was filed in the names of the petitioner, Daniels and Williams only and did not refer to the others in the organization. The income and expenses listed therein indicated

a business which was independently operated without reference to the organization and did not disclose the fact of receipt by the partnership of a share of the aggregate profits of the organization. It showed gross income of $148,143,[2] less deductions of $133,401, or a net income of $14,742 (R. 587). Among the deductions taken were "pay-outs" of $75,000 and payments to "writers" and "pick-ups" totaling approximately $48,000 (R. 591). The petitioner's distributive share of the net profits was stated to be $7,371, or 50 percent of the net income (R. 587). On his individual return for 1937 the petitioner reported this exact sum as income from "Daniels, Williams & Friedman" (R. 579).

The petitioner was familiar with and actively participated in the business both of the partnership and the organization of which it was a member. He was present at the organization meeting in June 1935 (R. 393), and was designated to represent the partnership's night bank (R. 421). For a time he held a part of the organization's "bank roll" (R. 398). In 1937 the petitioner was present "pretty

[2] The gross business actually done by the partnership's night bank alone in 1937 was between $255,000 and $312,000 (R. 136–137). Daniels testified that the daily net collection of the entire organization was from $3,500 to $4,500 for the day banks, or about $4,000 to $5,000, including the night bank (R. 396, 411–413). The game operated six days a week (R. 135), or, roughly, about 300 days a year. On this basis the net collection of the organization was between $1,200,000 and $1,500,000 a year. Since the net was about two-thirds of the gross (R. 118, 396), the total gross business was between $1,800,000 and $2,250,000 a year.

regularly" (R. 437) at its office on Saturday when the profits were distributed and received on behalf of the partnership's night bank its share of the organization net profits. In turn, he gave to Daniels and Williams their shares (R. 396, 412, 420, 437, 442, 457). At a previous trial involving the numbers operators the petitioner prevailed upon Daniels to give false testimony regarding the numbers business (R. 438–439, 443–444).

The question of income taxes and the filing of the 1937 partnership return were discussed in the presence of the petitioner just before the return was filed (R. 408–409). Daniels testified he told Williams and the petitioner that he "felt as though we were not filing our income correct, and that we should name all our partners, inasmuch as we were all in business together" (R. 409).

On the basis of these facts we believe that the question of the falsity of the partnership return and the petitioner's knowledge thereof were proper matters for the consideration of the jury. There was testimony that he knew that the proposed partnership return would not properly reflect the fact of the partnership's participation in the organization in that it would not name all partners who were in business together. In his individual return for 1937 (R. 579–585) he reported as net income from this partnership the exact amount shown as his distributive share in the partnership return (R. 587). By so doing he made the partnership return relevant and material and per-

mitted the inference that he was familiar with it. In view of his activities in the organization, his knowledge of the source of the partnership income and the amounts received by the partnership, the jury was entitled to consider the partnership return in connection with the question whether the partnership or the petitioner had received any unreported net income [3] and whether the petitioner did not in fact know that his distributive share was understated in that return. The return, therefore, was admissible.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DECEMBER 1941.

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[3] The partnership return was also necessary to show the petitioner's percentage of the partnership income.

U. S. GOVERNMENT PRINTING OFFICE: 1941